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A heavier hand reaches for the secrecy stamp

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Within the next few days the Administration is expected to issue a new executive order setting out the substantive and procedural criteria for the classification of government-owned or -generated information deemed to be sensitive from a national security standpoint. This will be the fourth such order since 1951 when President Truman established the first government-wide system for protecting the nation's secrets.

Since then, successive orders have given thousands of executive branch officials the authority to classify information that comes within their purview as Top Secret, Secret and Confidential, with the classification theoretically based on the degree of harm unauthorized disclosure would cause to the national defense or foreign relations.

In issuing their own executive orders on the classification system, the Eisenhower, Nixon and Carter orders were all attempts to tighten up the system, to make classification decisions more thoughtful and less automatic, and to encourage declassification. Thus, over the years, the number of agencies and persons with classification authority has been reduced, the criteria for classification have been defined with more specificity, a system of automatic declassification after the passage of a set number of years was devised and a general program of reviewing all classified information for declassification after 20 years was established.

Each of the orders was a step forward toward the goal of protecting only that information which truly needs protecting in the interests of national security and protecting it only so long as protection is needed. The proposed order is a step back. For the first time since the modern classification system was established, restrictions on classification will be eased. More information of dubious security relevance will be classified in the first place. Less information crucial to informed public debate will be declassified.

Perhaps such a result is inevitable when one considers the motive for the changes. For the first time, the aim of those who would devise a new order on the classification system is not to improve or affect the classification system as such; rather, the clear purpose is to help government litigation in Freedom of Information Act cases – though the government has never been forced to disclose classified information in such a case.

The Freedom of Information Act argument is at best speculative. The Administration wants to revise several provisions of the executive order which, it is alleged, make it harder to prove its case under the classified information exemption of the act – though, again, no judicial opinion has ever resulted in the disclosure of classified information. Among these proposals are two: to eliminate the provision in the current order which requires that before information can be classified, a finding must be made that its unauthorized disclosure "reasonably could be expected to cause at least identifiable damage to the national security"; and to establish a presumption that the unauthorized disclosure of any intelligence source or method does in fact cause identifiable damage to the national security.

In my view, if the government must satisfy a court that release of certain information will cause damage to the national security, it cannot do so without identifying that damage with reasonable specificity. Only amending the Freedom of Information Act can affect this burden. Eliminating "identifiable" disposes of no threat to the government's litigative position and sends the wrong message to the public and to classifiers.

The proposed presumption is also difficult to accept. There are clearly sources and methods which are not classified or classifiable under current executive order standards. In fact, the government has even told the US Court of Appeals for the District of Columbia that the New York Times and Pravda are sources within the meaning of the term.

It would also be wrong to encourage intelligence officials to automatically classify any source or method when there already exists a statute protecting intelligence sources and methods from disclosure which permits the government to withhold such information under the Freedom of Information Act but which does not require that harm to the national security be demonstrated.

In light of the tenuous gain to be derived in the context of Freedom of Information Act litigation and the already adequate protection now afforded intelligence sources and methods, no good reason exists to encourage overclassification in this area. The presumption device was created as an aid to classifiers, not a tool for litigants.

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There are other substantive changes to the present order that likewise are unwise from a classification standpoint and unsustainable from a litigation standpoint. If implemented as proposed, the new executive order will encourage overclassification and lessen confidence in the classification system – all because its focus, unlike its predecessor orders, is fixed on trying to give instructions to courts, not classifiers.

Rep. Edward P. Boland (D-Mass.) is chairman of the House Permanent Select Committee on Intelligence.